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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JORDAN STEIN, individually)
and on behalf of others)
similarly situated,)
)
Plaintiffs,)
) C.A. No. 22-314 (MN)
v.)
)
CLARIFAI, INC.,)
)
Defendant.)

Monday, November 21, 2022
2:30 p.m.
Teleconference

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

COOCH and TAYLOR, P.A.
BY: CARMELLA P. KEENER, ESQ.

-and-

EDELSON LLC
BY: ALEXANDER G. TIEVSKY, ESQ.
BY: SCHUYLER UFKES, ESQ.

-and-

KEOGH LAW, LTD.
BY: GREGG M. BARBAKOFF, ESQ.
BY: THEODORE H. KUYPER, ESQ.

Counsel for the Plaintiffs

1 APPEARANCES CONTINUED:

2
3 CONNOLLY GALLAGHER LLP
4 BY: LAUREN PATRICE DeLUCA, ESQ.

5 -and-

6 COOLEY LLP
7 BY: WHITTY SOMVICHIAN, ESQ.
8 BY: DARINA SHTRAKHMAN, ESQ.

9 Counsel for the Defendant

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14:33:14 12 THE COURT: Good afternoon, counsel. Who is
14:33:18 13 there, please?

14:33:19 14 MS. KEENER: Good afternoon, Your Honor. May it
14:33:21 15 please the Court, Carmella Keener from Cooch & Taylor on
14:33:24 16 behalf of the plaintiffs. Also on the line are my
14:33:30 17 co-counsel, Theodore Kuyper and Gregg Barbakoff from Keogh
14:33:34 18 Law. And from Edelson PC, Schuyler Ufkes and Alexander
14:33:40 19 Tievsky. Mr. Tievsky is admitted pro hac vice and will
14:33:42 20 argue today on behalf of the plaintiffs.

14:33:44 21 THE COURT: All right. Thank you.

14:33:50 22 MS. DeLUCA: Good afternoon, Your Honor. This
14:33:52 23 is Lauren DeLuca from Connolly Gallagher for defendant
14:33:56 24 Clarifai. With me on the line are my co-counsel from Cooley
14:34:00 25 LLP, Whitty Somvichian and Darina Shtrakhman. They will be

14:34:09 1 presenting. They are also admitted pro hac vice. We have
14:34:12 2 another member of Cooley who will be listening, Lynn Young,
14:34:16 3 and three representatives from Clarifai are present as well,
14:34:20 4 Matt Zeiler, Alicia Bricken and Atul Sahal.

14:34:25 5 THE COURT: All right. Good afternoon to all of
14:34:26 6 you. All right. So I have defendant's motion to dismiss
14:34:32 7 the First Amended Complaint before me and we have read the
14:34:38 8 papers and the cases including the recently submitted case,
14:34:42 9 but if you have anything else you wanted to add, this is
14:34:46 10 your chance. I'll hear from defendants first.

14:34:50 11 MR. SOMVICHIAN: Good afternoon, Your Honor.
14:34:52 12 This is Whitty Somvichian with Cooley. Just to kind of give
14:34:56 13 you a little bit of a roadmap, I will address the
14:35:00 14 extraterritoriality issues I'll start there. My colleague,
14:35:04 15 Darina Shtrakhman will address the other 12(b)(6) arguments
14:35:10 16 related to the BIPA action.

14:35:14 17 THE COURT: If we don't get past
14:35:18 18 extraterritoriality, is the other stuff important?

14:35:19 19 MR. SOMVICHIAN: It is not. The extra
14:35:23 20 territorial issues will be completely dispositive, Your
14:35:27 21 Honor, and that's why we thought we ought to start there
14:35:31 22 because that could obviate the remainder of the issues.

14:35:35 23 THE COURT: Let's start there. And what we'll
14:35:39 24 do is you can complete your presentation, then I will hear
14:35:43 25 from the plaintiffs on that issue, and then we'll move to

14:35:41 1 the other 12(b)(6) issues.

14:35:43 2 MR. SOMVICHIAN: That sounds good. Thank you,
14:35:45 3 Your Honor.

14:35:45 4 Let me just first start with one issue that I
14:35:52 5 don't think will take long, but it's worth noting. There is
14:35:55 6 some effort by the plaintiffs to dispute whether the BIPA
14:36:01 7 statute does or does not have extraterritorial application
14:36:06 8 and whether it was intended by the Illinois legislature to
14:36:09 9 reach outside of Illinois. The overwhelming weight of the
14:36:14 10 case law, Your Honor, confirms that it was not intended to
14:36:19 11 have extraterritorial application. That is confirmed, in
14:36:23 12 fact, by several of the plaintiffs' own cited authorities,
14:36:27 13 including the case that they submitted as a supplemental
14:36:30 14 authority, *Mahmood v. Berbix*. Just to quote that case, on
14:36:34 15 page 4 of the Westlaw decision it said, "Indeed because BIPA
14:36:41 16 does not expressly intend to operate extraterritorially, the
14:36:50 17 alleged BIPA violations must have taken place in Illinois."
14:36:55 18 So that's the plaintiffs' own case. It confirms the
14:36:59 19 question that we're confronted with today which is did the
14:37:02 20 alleged violations occur in Illinois and under the Avery
14:37:07 21 test the question is whether the acts constituting the
14:37:11 22 alleged violation occurred primarily and substantially in
14:37:15 23 this state.

14:37:15 24 The easiest way to see, Your Honor, that the
14:37:19 25 allegations here do not meet that standard and that the acts

Clarifai is alleged to have undertaken have no connection to Illinois is really to look at the plaintiffs' own cases because there really is a stark contrast to cases that have been allowed to proceed and what we have here which is a real outlier.

So if you look at the Rivera case against Google, the Patel case against Facebook, the Monroy case against Shutterfly, in each one of those cases, there was direct interaction between the defendant and Illinois residents, whether that was through the defendant's interactive websites or devices and software that they made available to Illinois residents, there was direct interaction that led to Illinois residents uploading data directly to the defendants.

And in at least the Rivera and Monroy cases, there was also allegations on the face of the complaint that that initial transmission of data was accompanied by information that would have shown the defendant that they were, in fact, interacting with Illinois residents. And that was through the inclusion of an IP address which was a proxy for determining location.

There are no similar allegations to that here, Your Honor. There is no allegation that Clarifai had any direct interaction with the plaintiffs, or any direct interaction with any Illinois resident. There is no

14:38:59 1 allegation that Clarifai had any ability once it received
14:39:06 2 the database that it allegedly received from OKCupid. There
14:39:11 3 is no allegation that Clarifai had any ability to know which
14:39:14 4 files may or may not have originated from an Illinois
14:39:18 5 resident. So those facts are in stark contrast to the cases
14:39:23 6 that plaintiffs have relied on to try to get past this
14:39:28 7 extraterritoriality hurdle.

14:39:30 8 There is another series of cases that provide an
14:39:33 9 important contrast. For example, the Clearview case, this
14:39:40 10 is cited at pages 8 and 10 of the plaintiffs' opposition.
14:39:46 11 In that case the plaintiffs were able to overcome an
14:39:51 12 extraterritoriality count. Their complaint alleged, and I'm
14:39:56 13 quoting now from page 1122 of the decision, the complaint in
14:40:02 14 that case alleged that "defendants trespassed on the
14:40:06 15 Illinois subclass members' private domain in Illinois,"
14:40:11 16 first, and then the complaint in that case also went on to
14:40:15 17 say that, "defendants have contracted with hundreds of
14:40:20 18 Illinois entities, both public and private."

14:40:23 19 So in that case, again, there was direct
14:40:26 20 interaction between the defendant and Illinois residents and
14:40:32 21 business dealings in Illinois that led to profits generated
14:40:37 22 from the alleged biometric information at issue. There were
14:40:42 23 other cases that are similar, *Advanced v. Microsoft* case
14:40:46 24 cited at pages 5 and 8 of the plaintiffs' opposition. A
14:40:52 25 related case, *Vance v. Amazon*, both of those also involved

complaints where the defendants were alleged to have utilized the alleged biometric information in Illinois and derived profits from business dealings in Illinois.

Again, Your Honor, no such allegations here. There is no fact alleged in the complaint to suggest that Clarifai did any kind of business in Illinois, whether it had to do with the biometric information or not. Certainly no allegation that Clarifai profited from the use of biometric information in the course of business dealings, specifically with Illinois business entities and again, nothing similar to the allegations that allowed the complaints to proceed in these other matters.

The other way I would suggest, Your Honor, that is helpful to think about how to apply the Avery standard here is to look at the complaint and see what is alleged to be the violation, number one, and number two, see if there are fact allegations to show that those actions occurred in Illinois. And if you go through that exercise here, it underscores the lack of any connection. If you look at paragraphs 9 and 10 of the complaint, it specifies what the alleged violations are. So at those paragraphs, one relates to plaintiff Stein, the other paragraph relates to plaintiff Goodman, but Clarifai is alleged to have "collected, obtained, stored, possessed and profited from plaintiffs' biometric identifiers and/or information."

14:42:46 1 So the relevant question to ask under Avery is
14:42:51 2 did any of those actions occur in Illinois and are there any
14:42:55 3 fact allegations in the complaint to suggest a connection
14:42:59 4 between those acts and Illinois? And there are not, Your
14:43:05 5 Honor. So did Clarifai collect or obtain any biometric
14:43:10 6 information in Illinois? No fact allegations that it did
14:43:15 7 so.

14:43:16 8 Did Clarifai store or use or possess the
14:43:19 9 biometric information in Illinois? Again, no allegations to
14:43:24 10 show that.

14:43:26 11 Did Clarifai profit from the use of biometric
14:43:29 12 information by virtue of business dealings in Illinois?
14:43:34 13 Again, no allegations to show any connection there.

14:43:37 14 So what we have here is a real outlier where the
14:43:42 15 only connection, if you can call it that, is the plaintiffs'
14:43:48 16 residence in Illinois. And this is precisely the
14:43:51 17 circumstance that Judge Stark addressed in the *McGoveran*
14:43:55 18 case, Your Honor. I won't belabor this because it is
14:43:59 19 addressed at length in the parties' briefs, but it's rare to
14:44:05 20 have a case that is so squarely on point in terms of both
14:44:10 21 the facts, the issues addressed, and the procedural posture
14:44:16 22 of the case. And we have that here in the *McGoveran* matter
14:44:21 23 where again there was no allegation of any direct
14:44:26 24 interaction between the defendant and any Illinois resident
14:44:29 25 of the alleged creation of biometric information. In that

14:44:32 1 case it was the analysis of voice recordings to generate
14:44:36 2 voiceprints. There was no allegation that any of that
14:44:39 3 process had anything to do with Illinois. It wasn't
14:44:43 4 conducted in Illinois. The outputs were not stored or
14:44:48 5 possessed or used in Illinois, or there were no allegations
14:44:52 6 to that effect.

14:44:53 7 And in that circumstance, Judge Stark found that
14:44:57 8 where the only connection is the plaintiffs' residency in
14:45:01 9 Illinois, that's not enough. And on top of that, the prior
14:45:04 10 finding in the Northern District of Illinois that there was
14:45:11 11 no jurisdiction, no personal jurisdiction in Illinois
14:45:15 12 because of a lack of sufficient connections to the forum
14:45:19 13 state, that underscored the fact that there was no violation
14:45:24 14 occurring in the state. So again, we have that same outlier
14:45:30 15 fact pattern here, not just with respect to the allegations
14:45:34 16 in the complaint, but the procedural posturing as well.

14:45:38 17 We also have a prior jurisdictional finding from
14:45:43 18 the Illinois court finding that there were no accounts
14:45:48 19 related to the allegations that were directed at Illinois or
14:45:53 20 occurred in Illinois. And Your Honor, I think this falls
14:45:58 21 squarely within what Judge Stark analyzed and concluded in
14:46:03 22 *McGoveran*. I think the same outcome should apply here. And
14:46:08 23 I'll pause there to see if you have any questions.

14:46:09 24 THE COURT: Counsel, I think I understand your
14:46:14 25 argument. All right. Anything else or should I ask the

14:46:19 1 plaintiffs for a response?

14:46:25 2 MR. SOMVICHIAN: Nothing from me, Your Honor,
14:46:27 3 unless you have questions.

14:46:28 4 THE COURT: No. So let me understand, then,
14:46:32 5 from the plaintiffs, how is this case not just like Judge
14:46:38 6 Stark in *McGoveran v. Amazon Web Search*?

14:46:43 7 MR. TIEVSKY: Thank you, Your Honor. This is
14:46:44 8 Alexander Tievsky for the plaintiffs.

14:46:48 9 I think that the -- taking a little bit of a
14:46:52 10 step back here and looking at where the *McGoveran* decision
14:47:00 11 misunderstood a point of Illinois law --

14:47:03 12 THE COURT: Okay, but wait a second. Wait a
14:47:06 13 second. Wait. Wait. I'll let you do that, but then when
14:47:10 14 you say that, I guess I need to understand, if I don't think
14:47:15 15 that Judge Stark misunderstood the law, if I agree with his
14:47:20 16 reasoning, then do you agree that I need to dismiss this
14:47:23 17 case?

14:47:24 18 MR. TIEVSKY: You know, reading the *McGoveran*
14:47:31 19 decision, it is difficult to say that if the logic in that
14:47:32 20 decision is followed that this case is -- there are some
14:47:33 21 differences and it is worth discussing them --

14:47:42 22 THE COURT: I'm sorry, I didn't quite
14:47:43 23 understand. You kind of cut off your sentence. I don't
14:47:44 24 understand what you just said. If I agree with Judge Stark,
14:47:52 25 with his reasoning, then is this dismissal warranted? I

14:47:57 1 didn't understand your answer. Sorry.

14:47:59 2 MR. TIEVSKY: The answer to that question is no.

14:48:01 3 And the reason is that there are allegations in the
14:48:04 4 complaint here that were not present in *McGoveran* with
14:48:09 5 respect to Illinois. The biggest one of those is the
14:48:11 6 presence of an Illinois base venture capital company that is
14:48:16 7 the one that facilitated this transaction. In other words
14:48:21 8 --

14:48:21 9 THE COURT: Wait, tell me -- wait, wait, wait,
14:48:24 10 hold on. Sorry, I'm trying to follow you. Point me to what
14:48:28 11 paragraph you're talking about that you say alleged
14:48:34 12 something different. So what paragraph should I be looking
14:48:37 13 at?

14:48:38 14 MR. TIEVSKY: We're looking at paragraph 38 in
14:48:41 15 the briefing and following.

14:48:45 16 THE COURT: Hold on. Let me get there. Okay.
14:49:05 17 And so we see at paragraph 38 the way that the defendant
14:49:10 18 here got these photos at all and was able to then extract
14:49:16 19 the biometric data is that for the purpose, for the exact
14:49:21 20 purpose of doing this, for extracting the biometric data and
14:49:26 21 profiting from it which is against the law, one of
14:49:30 22 Clarifai's main investors which is based in Illinois, in
14:49:35 23 Chicago, facilitated this transfer of information. The
14:49:39 24 entire transaction itself has this very close Illinois nexus
14:49:44 25 that was entirely absent from the *McGoveran* case. So if the

14:49:49 1 Court is looking for a factual distinction between the two
14:49:52 2 cases, this is an enormous one.

14:50:00 3 THE COURT: All right. Keep going.

14:50:02 4 MR. TIEVSKY: So, you know, so yes, if, you
14:50:07 5 know, as the defendant encourages, the Court ignores one of
14:50:11 6 the major Illinois connections here that is pleaded, it is
14:50:15 7 the same as *McGoveran*, but --

14:50:17 8 THE COURT: Let me just understand. This
14:50:19 9 company that you're talking about, Corazon Capital, that's a
14:50:24 10 third party, right?

14:50:25 11 MR. TIEVSKY: It is a third party but with a
14:50:27 12 close connection, that is -- so these pictures came from an
14:50:32 13 app OKCupid --

14:50:34 14 THE COURT: I'm sorry, why is that imputed to
14:50:38 15 Clarifai?

14:50:39 16 MR. TIEVSKY: Because the way that Clarifai got
14:50:41 17 these pictures from OKCupid is that there is an individual
14:50:50 18 who is a founder of this Chicago-based venture capital firm
14:50:55 19 who also tends to be one of the founders of OKCupid. And
14:51:01 20 that --

14:51:02 21 THE COURT: But did he do anything in Illinois?

14:51:04 22 MR. TIEVSKY: Yes. He used his company, Corazon
14:51:10 23 Capital which is based right here in Chicago to make this
14:51:18 24 transaction happen, to make this transfer of data from
14:51:24 25 otherwise unrelated companies, OKCupid and Clarifai, to make

14:51:30 1 that happen, that was coordinated through this Chicago-based
14:51:36 2 company.

14:51:39 3 THE COURT: Okay. I'm looking at paragraph 38,
14:51:42 4 it says, "Clarifai first gained access to those profile
14:51:48 5 photographs through one of clarified investors, Corazon
14:51:53 6 Capital, a Chicago-based capital group launched by OKCupid
14:51:59 7 founders. Corazon makes money when the companies that it
14:52:02 8 invest in succeed, thus venture capital firms like Corazon
14:52:07 9 provide assets to startups for pecuniary reasons, not
14:52:12 10 charitable ones." So the only Illinois connection there is
14:52:16 11 that Corazon Capital is based in Chicago, right, that's the
14:52:21 12 Illinois connection?

14:52:24 13 MR. TIEVSKY: The Illinois connection is that in
14:52:28 14 the following paragraph, what we allege is that the
14:52:32 15 co-founder of Corazon provided the database of pictures from
14:52:36 16 OKCupid to Clarifai as part of -- as part of Corazon's
14:52:40 17 investment in Clarifai. The whole transaction was
14:52:44 18 facilitated through this, through this Illinois company. I
14:52:48 19 don't think that that can just be --

14:53:02 20 THE COURT: So the Northern District of Illinois
14:53:06 21 courts that addressed this case before with respect to
14:53:10 22 personal jurisdiction didn't seem to think that that was
14:53:14 23 enough of a hook for Illinois to have jurisdiction over
14:53:18 24 Clarifai, right?

14:53:22 25 MR. TIEVSKY: Your Honor, I don't recall if that

14:53:21 1 fact was discussed specifically in that case.

14:53:26 2 THE COURT: It was. It was, wasn't it? Weren't
14:53:30 3 you involved in that case?

14:53:31 4 MR. TIEVSKY: I was not, no. We were --

14:53:35 5 THE COURT: Did you read it?

14:53:36 6 MR. TIEVSKY: I did.

14:53:37 7 THE COURT: Did you read that case?

14:53:39 8 MR. TIEVSKY: As I say, I don't recall off the
14:53:42 9 top of my head, but I will say that the extraterritoriality
14:53:47 10 analysis and the personal jurisdiction analysis are not
14:53:50 11 identical. And particularly, it's particularly important
14:53:54 12 that the Illinois extraterritoriality analysis set forth in
14:54:00 13 Avery is never intended to be applied across the board to
14:54:05 14 any Illinois statute whatsoever, it doesn't say that --

14:54:08 15 THE COURT: But if I assume that the
14:54:10 16 extraterritoriality, for example, I have to look and see
14:54:17 17 whether the conduct at issue here, defendant's conduct
14:54:24 18 rather than a third party, defendant's conduct occurred
14:54:27 19 primarily and substantially in Illinois; right?

14:54:31 20 MR. TIEVSKY: No, that's not the correct
14:54:32 21 statement of the law, Your Honor. And I can explain that.
14:54:33 22 In fact, in the Avery case, an allegation in that case was
14:54:42 23 about a large scale scheme run by an insurance company. The
14:54:44 24 allegations in that case was that the entire fraudulent
14:54:52 25 scheme was concocted and disseminated from the defendant's

14:54:56 1 office in Illinois. And the court said no, that's not good
14:54:59 2 enough. That's not what you should be looking at in this
14:55:02 3 particular case. And that's based on a detailed examination
14:55:06 4 of the statute that was at issue there, the Consumer Fraud
14:55:10 5 Act. And the decision there was that for the purposes of
14:55:12 6 the Consumer Fraud Act, again, based on the language of that
14:55:17 7 statute and the purposes of that particular statute which
14:55:20 8 was discussed at great length, that in that case you got to
14:55:24 9 look at the specific transaction involved and the way that
14:55:28 10 that transaction is connected to the state of Illinois.

14:55:31 11 But that doesn't just -- you can't just replace
14:55:34 12 the words Consumer Fraud Act with Biometric Information
14:55:38 13 Privacy Act in *Avery* and say that that is a correct
14:55:41 14 statement of Illinois extraterritoriality law. It's simply
14:55:44 15 not. The *Avery* decision doesn't support that conclusion.
14:55:48 16 If that were true there would be no need for the Illinois
14:55:51 17 Supreme Court to spend pages and pages and pages discussing
14:55:54 18 the Consumer Fraud Act specifically.

14:56:01 19 And so when you look at BIPA itself and when you
14:56:04 20 look at its preamble, its purposes both as stated in the
14:56:08 21 statute itself and as explained by the Illinois Supreme
14:56:11 22 Court in *Rosenbaum*, the idea that in order for BIPA to
14:56:14 23 apply, the collection of biometric information data has to
14:56:18 24 specifically take place in Illinois or that the defendant
14:56:21 25 has to be acting in Illinois, it simply doesn't add up. It

14:56:32 1 wouldn't make any sense. The purpose of BIPA for the
14:56:36 2 consumer to be able to say no to collection of or profit
14:56:40 3 from their biometric information, it wouldn't be able to
14:56:46 4 effect that purpose.

14:56:47 5 So the harm here that the Illinois Supreme Court
14:56:50 6 identified, and I'm quoting from *Rosenbaum* here, "the
14:56:54 7 consumers' right to control their biometric information by
14:56:58 8 requiring notice before collection and giving them the power
14:57:01 9 to say no by withholding consent."

14:57:07 10 So when you look at whether something happened
14:57:09 11 extraterritorially, one of the important things to look at
14:57:12 12 is where the harm takes place. And that harm in this case
14:57:14 13 plainly took place in Illinois where the people who lost
14:57:19 14 their right to say no are sitting.

14:57:25 15 THE COURT: So I'm sorry, it sounds to me like
14:57:29 16 you're saying that every court that has read this has
14:57:35 17 misunderstood *Avery*, including the Northern District of
14:57:38 18 Illinois.

14:57:40 19 MR. TIEVSKY: A number of courts have
14:57:42 20 misunderstood *Avery* in this context. And I will say not
14:57:47 21 every court has. One court that did understand it and that
14:57:50 22 we cite here was the Circuit Court of Cook County in
14:57:53 23 *American Civil Liberties Union v. Clearview* --

14:57:58 24 THE COURT: But hold on, hold on. How can you
14:58:00 25 possibly square that with the more recent case from that

14:58:05 1 court, *Wilk v. Brainshark* case which seemed to cite just the
14:58:14 2 opposite of what you're saying the *ACLU v. Clearview* case
14:58:19 3 said. How do you square those two?

14:58:22 4 MR. TIEVSKY: The Circuit Court and the Court of
14:58:27 5 Cook County may not always agree with each other. I would
14:58:30 6 say that Judge Meyerson's detailed explanation of the matter
14:58:34 7 in that Clearview case which was the case that pictures were
14:58:38 8 scraped just from the internet indiscriminately, it wasn't
14:58:42 9 even the Illinois connection that we alleged here. In that
14:58:45 10 case, the court determined that the extraterritoriality
14:58:48 11 provisions of BIPA at least at the pleading stage, that it
14:58:54 12 didn't warrant -- that the case could continue based on I
14:59:01 13 believe the facts that the plaintiffs are Illinois
14:59:04 14 residents, that their pictures appeared on the internet and
14:59:07 15 that this company pulled pictures off the internet and
14:59:11 16 scraped the biometric data from them.

14:59:13 17 So to say that every court has misinterpreted or
14:59:18 18 misunderstood *Avery* is not correct. I would say that Judge
14:59:21 19 Meyerson got it right there, and that in the Facebook case,
14:59:24 20 the Ninth Circuit got it right as well. And quoting from
14:59:29 21 the Ninth Circuit case here, "It is reasonable to infer the
14:59:32 22 General Assembly contemplated BIPA application to
14:59:36 23 individuals who are located in Illinois even if some
14:59:39 24 relevant activities occurred outside the state."

14:59:42 25 THE COURT: Some relative activities?

14:59:44 1 MR. TIEVSKY: Some relevant activities occurred
14:59:47 2 outside the state.

14:59:47 3 THE COURT: Meaning that -- that doesn't exclude
14:59:51 4 that most of the -- you know, a big chunk of the activity
14:59:57 5 occurred in Illinois, right?

14:59:59 6 MR. TIEVSKY: In the *Facebook* case?

15:00:02 7 THE COURT: Yes. I mean, it can still be there
15:00:07 8 even if something happens outside of Illinois, that's very
15:00:10 9 different from saying that you don't really need anything in
15:00:13 10 Illinois.

15:00:14 11 MR. TIEVSKY: In the *Facebook* case what occurred
15:00:16 12 in Illinois was not particularly different from what
15:00:19 13 occurred in Illinois here. In the *Facebook* case what happened
15:00:22 14 in Illinois is the plaintiff took a picture of themselves
15:00:25 15 with their phone and unloaded it to an app which from the
15:00:28 16 perspective of the plaintiffs in this case is not really any
15:00:31 17 different. It's the same thing. It's difficult I guess for
15:00:34 18 me to see how one person taking a picture of himself and
15:00:37 19 uploading it to an app has no cause of action and another
15:00:40 20 one who takes pictures of themselves and uploads it to an
15:00:43 21 app does have a cause of action for what is the effectively
15:00:46 22 the same thing, collection of biometric data without
15:00:49 23 consent.

15:00:52 24 THE COURT: All right. Anything else?

15:01:02 25 MR. TIEVSKY: As I said, I also want to go back

15:01:11 1 to the idea that we need to be focused here on defendant's
15:01:15 2 conduct. Avery says the exact opposite of that. I'm
15:01:19 3 quoting from Avery here. There are basically -- there are
15:01:24 4 virtually no circumstances relating to the disputed claims
15:01:27 5 and practices at issue which occurred in Illinois for these
15:01:31 6 plaintiffs who are not Illinois residents. The appellant
15:01:35 7 court's statement that fraud disseminated from State Farm's
15:01:37 8 headquarters is insufficient. In other words, finding the
15:01:45 9 defendants have all of their practices in Illinois is not
15:01:48 10 what the Avery analysis or the extraterritoriality analysis
15:01:53 11 is designed to do. The extraterritoriality analysis is
15:01:57 12 designed to prevent nonresidents of Illinois from bringing
15:02:01 13 their non-Illinois claims into the state or under the
15:02:04 14 state's law. But when you have Illinois plaintiffs trying
15:02:07 15 to assert their fundamental Illinois statutory rights that
15:02:14 16 the Illinois Supreme Court has determined are extremely
15:02:18 17 important, the fact that the data processing or some of the
15:02:21 18 defendants are doing that outside Illinois, that is not or
15:02:27 19 should not be in consideration.

15:02:31 20 THE COURT: Okay. Defendant, do you want to
15:02:36 21 respond?

15:02:39 22 MR. SOMVICHIAN: Yes, Your Honor. Three very
15:02:43 23 can quick points. On this issue around Corazon and this
15:02:47 24 individual Max Krohn, I don't agree with counsel's
15:02:51 25 characterization of what is alleged in the complaint. And

15:02:57 1 if you actually look at what is stated factually in
15:03:01 2 paragraphs 38 and 39, it does not say that Corazon entity
15:03:08 3 enabled the transfer of data. Paragraph 39 refers to Max
15:03:14 4 Krohn and some actions that he took. It doesn't allege that
15:03:18 5 he did those things on behalf of Corazon, that he was acting
15:03:24 6 on behalf of the company. It doesn't allege that any of the
15:03:28 7 acts constituting the transfer of the database occurred in
15:03:34 8 Illinois or any discussions about transferring the database
15:03:37 9 occurred in Illinois, so there is really no connection in
15:03:42 10 paragraphs 38 and 39 other than the happenstance that
15:03:48 11 Corazon happens to be based in Chicago, I don't think that
15:03:50 12 moves the needle.

15:03:54 13 Second the idea that the plaintiffs' residence
15:03:56 14 is enough to show a violation occurring in Illinois because
15:04:00 15 they felt or allegedly suffered harm there, you could say
15:04:06 16 that in any case where the plaintiff resides in Illinois,
15:04:13 17 really regardless of what the type of cause of action is,
15:04:18 18 you can always say that the harm was suffered in Illinois by
15:04:21 19 virtue of the facts that the plaintiff resides there, but
15:04:24 20 that's not really alleging anything other than their
15:04:27 21 residence.

15:04:28 22 So it comes around full circle to the rule
15:04:30 23 that's acknowledged in *McGoveran* and other cases that we
15:04:32 24 have cited in our reply brief at page 3, all acknowledging
15:04:35 25 that a plaintiff's residence in Illinois is not enough, and

15:04:42 1 the fact that they resided there and claim that they
15:04:45 2 suffered harm there doesn't change the analysis, it's really
15:04:50 3 stating nothing more than the fact of their residence.

15:04:54 4 Last point that I'll make is this notion that
15:05:02 5 this case is just like the *Facebook* case, and why should
15:05:07 6 there be a different result here.

15:05:11 7 Your Honor, in that circumstance that counsel
15:05:13 8 described when individuals in Illinois are uploading photos
15:05:17 9 to Facebook, in that case they were interacting directly
15:05:21 10 with the defendant. The defendant made an interactive
15:05:25 11 website available to Illinois residents that enabled them to
15:05:29 12 directly upload photos to the defendant. And if anything,
15:05:33 13 that underscores why the circumstances here are so
15:05:37 14 different. There was no direct interaction like that. So I
15:05:41 15 do think this case is squarely governed by *McGoveran*. I
15:05:45 16 don't see a basis for different results. And we would ask
15:05:49 17 you to dismiss this case on extraterritoriality grounds for
15:05:53 18 the same reasons that Judge Stark found.

15:05:58 19 THE COURT: Okay. Just give me a second to take
15:06:02 20 a look at something.

15:06:06 21 Okay. Thank you for the arguments today.
15:07:50 22 Presently before me is Defendant's motion to dismiss the
15:08:00 23 First Amended Complaint under Rule 12(b)(6). Defendant's
15:08:04 24 motion is based on the argument that the Illinois Biometric
15:08:08 25 Information Privacy Act, or BIPA, does not have

extraterritorial reach and the First Amended Complaint fails to adequately plead that the complained of conduct occurred primarily and substantially in Illinois. I agree and will grant Defendant's motion.

Plaintiffs Jordan Stein and Deborah Goodman accused Defendant Clarifai of violating BIPA by improperly obtaining and then using Plaintiffs' OKCupid pictures to train facial recognition software without Plaintiffs' consent or knowledge. The parties disagree over whether BIPA extends to extraterritorial conduct which is the first issue I must address in evaluating Defendant's motion. Ultimately I agree with Defendant that BIPA does not have extraterritorial reach and the only way for Defendant's conduct to be actionable under the statute is if the offending conduct occurred primarily and substantially in Illinois.

In *Avery v. State Farm Mutual Auto Insurance Company*, 835 N.E.2d 801 at page 852, the Illinois Supreme Court in 2005 made clear that under Illinois law a statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute. In looking at the statute, I see no express provision making clear that the legislative intent was to give the BIPA extraterritorial reach. This conclusion is in line with a number of cases that have addressed the same

15:09:43 1 issue including recent cases from the Northern District of
15:09:47 2 Illinois and here in Delaware, for example, *Monroy v.*
15:09:52 3 *Shutterfly, Inc.*, No. 16-10984, 2017 WL 4099846, at *5 (N.D.
15:10:00 4 III. Sept. 15, 2017) in Illinois from September of 2017, and
15:10:06 5 here in Delaware, Judge Stark's decision in *McGoveran v.*
15:10:10 6 *Amazon Web Servs.* from last September.

15:10:14 7 Plaintiffs cite to the 2021 *American Civil*
15:10:19 8 *Liberties Union v. Clearview AI, Inc.* case from the Circuit
15:10:22 9 Court of Illinois to suggest that BIPA may have
15:10:25 10 extraterritorial effect. But that case does not squarely
15:10:29 11 hold that the BIPA has extraterritorial reach and it is hard
15:10:34 12 to reconcile that with the more recent cases like *Wilk v.*
15:10:38 13 *Brainshark* from the Northern District of Illinois in
15:10:39 14 September of this year finding the opposite. Ultimately, I
15:10:51 15 will follow the same path as the Northern District of
15:10:59 16 Illinois cases and Judge Stark from last year in finding
15:11:02 17 that the BIPA does not have extraterritorial reach. Thus
15:11:06 18 any purported BIPA violation on the part of Defendant must
15:11:08 19 have occurred in Illinois.

15:11:10 20 Under the relevant test from *Avery*, the question
15:11:12 21 is whether the Defendant's conduct occurred primarily and
15:11:15 22 substantially in Illinois. Defendant argues that the First
15:11:18 23 Amended Complaint must be dismissed because there are no
15:11:21 24 allegations that BIPA violations occurred primarily and
15:11:24 25 substantially in Illinois or that any violations at all

15:11:27 1 occurred in Illinois, and I agree. The Illinois-related
15:11:31 2 conduct that is alleged in the First Amended Complaint is
15:11:34 3 only conduct that Plaintiffs engaged in. Primarily what is
15:11:38 4 alleged is that Plaintiffs are both residents of Illinois in
15:11:43 5 paragraphs 9 and 10 of the First Amended Complaint,
15:11:46 6 Plaintiffs were residents of Illinois when they joined
15:11:49 7 OKCupid, that's also in those paragraphs. And Plaintiffs
15:11:53 8 uploaded their pictures to OKCupid from computers and local
15:11:58 9 devices in Illinois. That's in paragraph 58, 59 and 72.

15:12:03 10 As to Defendant's conduct, the First Amended
15:12:07 11 Complaint really only alleges that Clarifai captured
15:12:11 12 biometric identifiers from Plaintiffs' photographs and used
15:12:13 13 their facial templates to train recognition technology.
15:12:17 14 That's in paragraph 63, 64 and 75 through 77. Plaintiffs
15:12:21 15 never alleged that Clarifai performed any of this conduct in
15:12:25 16 Illinois. In fact, there is no specific conduct alleged
15:12:27 17 that directly connects Clarifai's conduct to Illinois in any
15:12:31 18 way. The closest that Plaintiffs come is by alleging that
15:12:34 19 one of Clarifai's investors, Corazon Capital, is based in
15:12:38 20 Chicago and one of Corazon's founders provided the OKCupid
15:12:42 21 photographs. That's in paragraphs 38 and 39, which we
15:12:46 22 discussed today. These allegations do not allow the Court
15:12:50 23 to plausibly infer that Clarifai committed any BIPA
15:12:54 24 violations through conduct performed primarily or
15:12:58 25 substantially in Illinois.

15:13:00 1 Ultimately, I find that this case is analogous
15:13:03 2 to the *McGoveran* case before Judge Stark last year. There
15:13:07 3 plaintiffs sued Pindrop and Amazon Web Services for
15:13:11 4 collecting voice audio from Illinois callers and purportedly
15:13:17 5 using biometric data from that audio in violation of BIPA.
15:13:20 6 Defendants moved to dismiss on the grounds that there were
15:13:23 7 no allegations that any BIPA violation occurred in Illinois.
15:13:24 8 Judge Stark agreed finding that at best, "Plaintiffs'
15:13:29 9 concrete allegations about the case's connection to Illinois
15:13:32 10 are nothing more than repeated statements phrased three
15:13:34 11 different ways about plaintiffs' residency." That was at
15:13:40 12 page 4 of the Westlaw version. Defendants maintained data
15:13:45 13 centers in states other than Illinois and plaintiffs had not
15:13:47 14 alleged otherwise. At bottom, the *McGoveran* plaintiffs
15:13:50 15 merely alleged they were Illinois residents, that their
15:13:53 16 phone calls originated from Illinois from Illinois phone
15:13:57 17 numbers.

15:13:57 18 The same is true here, generally - the
15:14:00 19 Plaintiffs' allegations focus on where Plaintiffs reside and
15:14:02 20 where they uploaded the pictures from. There is nothing
15:14:05 21 about Clarifai obtaining the pictures through conduct that
15:14:08 22 it performed in Illinois, or that any of Clarifai's Illinois
15:14:12 23 based conduct violated the BIPA, or even that Clarifai had
15:14:16 24 the presence in Illinois. There are no allegations from
15:14:19 25 which I can plausibly infer that Clarifai performed any

actionable conduct primarily or substantially in Illinois.

And as Judge Stark did in *McGoveran*, I find it relevant that the Northern District of Illinois dismissed the prior case between these parties because personal jurisdiction over defendant was lacking in Illinois. In *McGoveran* there had been a prior lawsuit between the parties in the Northern District of Illinois that had been dismissed under Rule 12(b)(2) because there weren't sufficient connections between defendants and Illinois. Judge Stark found that dismissal further underscored the weak connection between plaintiffs' allegations in Illinois. And I find the same is true here. The previous suit between the parties in the Northern District of Illinois was dismissed on the very same grounds as the previous suit in *McGoveran*, lack of personal jurisdiction over the accused defendant. Specifically, the Court found that there was no evidence that Clarifai purposefully directed suit-related activities at Illinois such that it should be subject to specific personal jurisdiction. That's from 526 F. Supp 3d 239 at pages 344 and 45. Instead, "the only alleged tie to Illinois with respect to Clarifai's acquisition of the photographs is through Corazon, a Chicago-based venture capital fund ...[but] Clarifai's conduct with Illinois must come from its suit-related activity in the forum state, not from the activity of a third party." The Court also found

15:15:53 1 that despite selling to two Illinois customers, there was
15:15:57 2 not sufficient evidence to show that Clarifai targeted its
15:16:01 3 facial recognition products to Illinois customers. As such,
15:16:05 4 personal jurisdiction over Clarifai was lacking and the
15:16:08 5 complaint was dismissed. This result is particularly
15:16:12 6 noteworthy because the parties engaged in jurisdictional
15:16:13 7 discovery before the motion to dismiss was decided.
15:16:16 8 Plaintiff did not appeal or otherwise try to amend the
15:16:20 9 Northern District of Illinois complaint - instead Plaintiff
15:16:21 10 just refiled the same case here. I find this significant
15:16:25 11 because even after jurisdictional discovery, Plaintiffs
15:16:28 12 struggled to come forward with plausible allegations that
15:16:31 13 Clarifai has engaged in Illinois-related conduct that could
15:16:35 14 be subject to BIPA.

15:16:37 15 In sum, given that the First Amended Complaint
15:16:39 16 here fails to adequately allege that Defendant's purported
15:16:41 17 BIPA violations were based on conduct that primarily and
15:16:49 18 substantially occurred in Illinois, I am going to grant
15:16:53 19 Defendant's motion to dismiss.

15:16:54 20 So that is my ruling on the motion to dismiss.
15:17:02 21 Is there anything else that we need to address while we are
15:17:05 22 on the phone?

15:17:09 23 MR. TIEVSKY: Yes, Your Honor, from the
15:17:11 24 Plaintiff, I would like to understand if the motion to
15:17:13 25 dismiss is with or without prejudice for relief.

15:17:17 1 THE COURT: Well, I have not received any
15:17:19 2 requests to amend. Plaintiffs didn't raise it in their
15:17:24 3 papers and you didn't ask me about that today. Where did
15:17:26 4 you make that request to amend?

15:17:30 5 MR. TIEVSKY: We have already amended our
15:17:32 6 complaint, so it is not in the motion. To the extent that
15:17:37 7 the Court, you know, believes that we can plead additional
15:17:41 8 facts, we would like another chance to do so, or at least
15:17:44 9 the option to have that, but we will submit a written motion
15:17:48 10 to that effect if it is determined that we can plead
15:17:51 11 alternate facts. I don't know that given the Court's
15:17:54 12 ruling. I would have to look at it and see if that's even
15:17:57 13 possible.

15:17:58 14 THE COURT: All right. Well, I don't have
15:18:00 15 motions to amend pleadings. So if you think that you can
15:18:04 16 adequately plead sufficient Illinois conduct on the part of
15:18:10 17 Defendants so as to come within the reach of BIPA, I suppose
15:18:15 18 you can follow my procedures and seek leave to amend. That
15:18:20 19 is not a motion that is something where you have to call up
15:18:23 20 and submit, and you're going to have to submit to me your
15:18:26 21 proposed amendment with red lines so that we can look at
15:18:30 22 them.

15:18:32 23 So why don't you go and determine whether or not
15:18:36 24 you can plead that and then you can talk with the Defendants
15:18:39 25 and get back to me. Any request for leave to amend, though,

15:18:44 1 would have to come within the next thirty days.

15:18:47 2 Anything else?

15:18:50 3 MR. TIEVSKY: Nothing from the Plaintiff, Your
15:18:52 4 Honor.

15:18:52 5 MR. SOMVICHIAN: Nothing for Clarifai, Your
15:18:55 6 Honor.

15:18:55 7 THE COURT: All right. Thank you, everyone.
15:18:56 8 Have a good holiday.

9 (Teleconference concluded at 3:18 p.m.)

10

11 I hereby certify the foregoing is a true and
12 accurate transcript from my stenographic notes in the proceeding.

13

13 /s/ Dale C. Hawkins
14 Official Court Reporter
15 U.S. District Court
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